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No. 832

Supreme Court of the United States

OCTOBER TERM, 1960

SALYER LAND COMPANY,
Petitioner,

v.

THE COUNTY OF KINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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May, 1961

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The issue in this case is the ownership of 34,865 tons of barley, and it has isolated for presentation the fundamental problem of when federal question jurisdiction attaches in a definitive way not often to be seen. For the issue is whether petitioner owned the barley, or whether the federal government owned it. All of the contracts upon which that issue of title is to be determined are between petitioner and the federal government. And, as we have been told by this Court,

> "The . . . construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the *titles* . . . which they create or permit, all present questions of federal law not controlled by the law of any state." *U. S. v. Allegheny County*, 322 U.S. 174, 182 (1944). [Emphasis added].

Are the "questions of federal law" spoken of in *Allegheny*, "federal questions", such as will support jurisdiction under 28 U.S.C. § 1331?

The brief of the respondent provides no assistance in the consideration of this problem. It may perhaps be summarized in its bald statement that,

> "An incidental question is the ownership of the property."[1]

The Court of Appeals itself has exposed this fallacy:

> "The oft repeated and main objection of appellant has been and is that on the tax levy date it was not the owner of the taxed barley. Thereby is presented *the one and only ultimate question* to be decided in any court, whether state or federal." [Emphasis added].

Here is a case whose raw materials are contracts between the petitioner and the government. Presumably they are to be controlled by federal law. *U. S.* v. *Allegheny County*, supra;[3] *U. S.* v. *McCabe Co.*, 261 F. 2d 539 (8th Cir. 1958); and *U. S.* v. *LeRoy Dyal Co.*, 186 F. 2d 460 (3rd Cir. 1950). Something more is then added. The contracts are in a form prescribed by fed-

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[1] Respondent's brief, p. 2.

[2] Page 4a of the petition for certiorari. The opinion below has now been reported. Salyer Land Company v. County of Kings, 285 F. 2d 481 (9th Cir. 1960). There is not now, and never has been, any question in this case concerning the validity or construction of California tax law, or of procedures thereunder. See the discussion between the Court and counsel at pp. 64-70 of the Record, pp. 18-19 of the petition for certiorari.

[3] In the petition for certiorari petitioner stated that the decision below is in conflict with *Allegheny*. Significantly, respondent county in its brief in opposition has not mentioned *Allegheny*.

eral regulations, and are entered into by the Commodity Credit Corporation with thousands of different persons throughout the United States. The Congress, in granting authority for the making of those contracts, specifically provided that they are not to be controlled by state law.[4] Does the determination of an issue of title arising out of those contracts provide a question of state or of federal law? If it be the latter, does that federal question support jurisdiction of the U. S. District Court under 28 U.S.C. § 1331? These questions, which so clearly appear to call for affirmative answers, are answered in the negative by the decision below.

Whether we turn to the classic statements in *Osborn* v. *Bank of United States,* or to the literary excellence of Mr. Justice Cardozo's opinion in *Gully* v. *First National Bank,* 299 U.S. 109 (1936),[5] or to this Court's more recent holding in *Bell* v. *Hood,* 327 U.S. 678 (1946), the practicing attorney does not know when federal question jurisdiction attaches, the trial courts cannot be sure, and the scholars have made clear their uncertainty.

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[4] 15 U.S.C. § 714b (g).

[5] The oft quoted statement from *Gully* is:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

See Hart & Wechsler, The Federal Courts and the Federal System, where the authors say, at page 765, "Is this statement helpful? Is it accurate?"

Mr. Justice Frankfurter, speaking for this Court in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959), stated that

> ". . . [O]nly if the applicable law is 'federal' law would jurisdiction be proper under § 1331." [358 U.S. at 376].

Can we not conclude from this, that if the applicable law *is* federal, jurisdiction under § 1331 is proper?

The learned authors of Hart and Wechsler, *The Federal Courts and the Federal System*, after a thorough exploration of the problem, say this:

> "Would it be sound to conclude that an action arises under federal law, for the purposes of statutory grants of original district court jurisdiction, if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law—whether that proposition is independently applicable or becomes so only by reference from state law?"[6]

But the statement is in question form, as discussions of the subject must be unless this Court provides the answer. It is respectfully submitted that the petition for certiorari should be granted.

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[6] At page 769.